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SUPREME COURT, U.S.

No. 06-396

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,

Petitioner

v.

Alex Mirzayance,

Respondent

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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Brief in Opposition

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether there is any issue of law created in the Ninth Circuit's unpublished opinion finding that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), for a last minute withdrawal of respondent's already prepared, credible, and sole defense surrendered for no countervailing benefit?

2. Whether AEDPA's deferential review standard was properly applied after the state courts did not address the issue squarely presented it, and where the two separate Circuit panels that reviewed the case applied the 28 U.S.C. § 2254(d) standard whether the state court's unexplained denial of the claim was unreasonable in light of this Court's precedent?

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[1] Under Rule 15.2, respondent's Brief in Opposition is to argue misstatements of law in the petition or deficiencies "based on what occurred in the proceedings below."

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STATEMENT OF THE CASE

Respondent Alex Mirzayance filed a habeas petition in the Central District of California challenging his state conviction for the murder of his cousin, Melanie Ookhtens. He asserted that his trial counsel provided ineffective assistance of counsel in advising him to waive his only defense, not guilty by reason of insanity (NGI), on the morning the NGI trial was to commence. The defense, which the federal courts found credible, was surrendered for no benefit to respondent whatsoever.

Respondent asserted that counsel had no rational tactical reason for withdrawing the insanity defense, nor could a valid tactical reason exist given that the NGI defense was respondent's only defense and was ready for trial.

Despite vigorously pressing the incompetency of counsel claim in the California appellate courts, neither the Court of Appeal nor the California Supreme Court addressed it in denying relief. Two separate Ninth Circuit panels agreed that the insanity defense appeared strong with the first remanding for an evidentiary hearing on why trial counsel decided to waive respondent's only defense on the morning the insanity trial was to commence. Quoting from U.S. v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996), that first panel wrote: "We have a hard time seeing what kind of strategy, save an ineffective one, could lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense he specifically

stated he had every intention of presenting." Petitioner's Appendix [hereafter "PA"] D-73,74.

At the evidentiary hearing, defense counsel confirmed that there was no benefit whatever for respondent from withdrawing the NGI defense. Respondent also proved the bona fides of the NGI defense through the testimony of three experienced forensic psychiatrists and two psychologists. They testified that respondent, due to a long standing serious mental disease, met the California legal definition of insanity and affirmed that they were prepared to so testify at the NGI trial. The Magistrate-Judge's Report & Recommendation [R&R], adopted by the district court, found that these and other "witnesses could have testified credibly and therefore perhaps successfully." PA C-68. On appeal, the Ninth Circuit panel agreed that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), and affirmed the district court grant of relief. PA B-6.

STATEMENT OF FACTS[2]

On October 13, 1995, Melanie Ookhtens was a

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[2] Petitioner fails to recite the facts supportive of the panel decision that trial counsel was ineffective in abandoning the insanity defense, respondent's only defense. Respondent thus supplements the factual recitation with the facts explaining the basis for the relief granted by the courts below. Cites to "RT" are to the federal evidentiary hearing. "Trial RT" refers to the state trial proceedings which were exhibits in the federal district court hearing. "MER" stands for the respondent's excerpts of record in the Ninth Circuit.

college student at the University of Southern California. Her parents were out of the country on vacation and she and respondent, her younger cousin, planned to pick them up at the airport that night. That afternoon, Melanie's grandmother and aunt went to Melanie's residence to prepare the house for the parent's return. Respondent had already arrived to meet Melanie. As a family relation, he had ready access to the home.

When the grandmother and her daughter opened the front door, respondent seemed "startled," "[m]aybe he was expecting Melanie, and when he saw us, he got confused." Trial RT 96. The grandmother described respondent as "following me wherever I was going with the strange walking." Trial RT 97. She found that respondent was acting very "manly" which was "extremely" abnormal for him, id. at 92, as respondent normally was a "quiet, shy person." Id. at 95. The grandmother testified respondent's relationship with Melanie was very close, like "sister and brother." Trial RT 94.

Respondent's trial attorney, Mr. Wager, testified that his strategies for the guilt trial were to call Dr. Paul Satz, a psychologist, as the sole expert witness at the guilt trial. Dr. Satz conducted thirty psychological and neuropsycho-logical tests, thirteen of which focused on respondent's frontal lobe brain damage, and nine showed evidence of such impairment. Dr. Satz testified he found significant brain damage, "of a congenital form, long-standing, enduring

structural defect of the nervous system, of the brain." Trial RT 467.

Other lay witnesses supported the mental defense. One was respondent's friend, Laurent Meira, who testified at the guilt trial that on the Friday evening of the homicide, respondent picked him up outside his condominium in Pasadena at approximately 8:30 p.m., and "seemed pretty anxious, pretty excited . . . agitated." Trial RT 117. Respondent told him he had shot his cousin in the head and stomach. Trial RT 120-121. Meira suggested that respondent go to the police station and he agreed. Trial RT 123. Respondent stated to Meira he had been carrying his gun since Wednesday because he "felt pretty bad," "that he was followed," and that "someone was after him." Trial RT 149-150.

Respondent's trial attorney, Don Wager, testified at the district court evidentiary hearing that an insanity verdict was "what we were really driving for more than anything else," RT 50, and that he felt he had to obtain a second-degree murder verdict at the guilt trial or the prospect of a subsequent verdict of insanity was virtually hopeless. However, he chose to withhold from the guilt phase every one of the psychiatrists who found respondent did not harbor premeditation and deliberation at the time of the homicide. RT 50. Wager viewed Dr. Satz's cross-examination an "absolute disaster," RT 49, because he performed "terribly," RT 89, but he took no remedial action

such as simply calling one or more of the other more experienced forensic psychiatrists to testify at the guilt phase trial.

Wager testified he abandoned the insanity defense because Mirzayance's parents refused to testify on the morning the insanity trial was to begin. RT 57. Mirzayance's parents denied they refused to testify, RT 174, 295, and their family attorney, James Lund, testified that on the morning of trial Wager did not tell him the parents refused to testify. Rather, Wager told him (that in Wager's opinion) the parents were in "too much pain" or "anguish" to testify. RT 281. (The magistrate judge found that "[w]hile it therefore may be accurate in a precise, semantic sense to say that the parents never *refused* to testify, the Court finds that the parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as refusal." PA C-43 (emphasis in original).)

Wager made no efforts to present the insanity defense. He did not advise the parents to talk to others about testifying even though the mental health experts had previously interviewed the parents and were ready to counsel them about their concerns. RT 105-106, 111. Wager did not ask for a brief continuance to permit the parents to reconsider their "reluctance." He never told respondent that his parents had refused to testify, or asked respondent to talk to them about reconsidering. RT 111.

Importantly, Wager knew he could proceed with his

expert evidence at the NGI trial as he correctly assumed that live parental testimony was not important or necessary to their testimony. RT 99. The experts testified at the hearing that they would have presented their testimony with equal vigor whether or not the parents testified because the parents' information was incorporated into their opinions from interviewing them.

Wager's decision to waive the NGI trial was prompted by an erroneous understanding of California law. This was his first insanity defense trial. He incorrectly believed that the jury's finding of first-degree murder was the functional equivalent of a finding that Mirzayance was legally sane, and that the insanity defense was virtually hopeless for that reason. The only ray of hope Wager claimed to see was the possibility of some kind of jury nullification based on sympathy for respondent if his parents testified and wrenched the jurors' hearts: "I saw no sense in proceedings with a defense that had no possibility now of having an emotional portion to it so that the jury could then find in favor of this defendant they had already found guilty of first-degree murder and, whether they knew it or not, under the facts of this case, legally sane. Without the parents, it would be hopeless. That was my feeling at the time." RT 65.

Wager's gross misunderstanding of California law led to his self-inflicted state of hopelessness. He wrongly believed that the jury's guilt finding of first degree murder

was tantamount to a rejection of the insanity defense: "*once the jury had found that he had maturely and meaningfully deliberated and premeditated,* they had unknowingly decided that he had -- he knew the consequences of his actions and the nature and quality of his actions although they didn't know it.[3] But in order to find, therefore, that he was insane, he [the jury] would have to in effect disregard their earlier findings." RT 124-125 (emphasis supplied). His understanding of the relevant law was wrong.

At the guilt trial, the prosecutor correctly argued to the guilt jury that a finding of insanity and a finding of first degree murder were independent of each other: "Rational plays no part in this particular case because the defendant did not act rationally. That does not negate malice, it does not negate premeditation and deliberation." Trial RT 842-843.[4]

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[3] The "maturely and meaningfully" mental elements of first-degree murder were deleted from the California statutory definition of first-degree murder in 1981. All the jury had to find in 1997 for first-degree murder was intent to kill "formed or arrived at or determined upon as a result of careful thought and weighing considerations for and against the proposed course of action," which could occur "in a short period of time." Calif. Penal Code § 189. The second panel opinion noted Wager's error at PA B-5 n. 1.

[4] The prosecutor also reminded jurors that "sanity is conclusively presumed. You are not dealing with that issue here...." Trial RT 768. "So don't sit back there and argue whether or not he was insane or whether he was sane. That is not yet before you...." Trial RT 769. Further,"[a] finding of deliberation and premeditation is

(continued...)

Wager's subjective hopelessness was thus attributable in significant part to his misunderstanding of California law. At the same time, Wager clearly recognized that withdrawal of the insanity defense afforded no benefit to respondent whatsoever, but rather doomed him to a mandatory life term in state prison:

> Q. Was there anything Alex [respondent] gained by waiving the N.G.I. trial?
>
> A. [Wager] No. RT 123.

All the subpoenaed mental health experts were shocked by the abandonment of the insanity defense. As Dr. Bennett Blum testified: "Being informed of the decision to withdraw the insanity plea was a surprise to me given the conclusions reached by myself and other mental health experts regarding Mr. Mirzayance's state of mind. I was not consulted about this decision. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity in this case was reasonable and thus my surprise at the announcement of its abrupt withdrawal." RT 553.

Dr. Ronald Markman, a psychiatrist and lawyer, testified he "was not consulted prior to the abrupt withdrawal of the NGI plea which did not make either psychiatric or legal sense. In my judgment, based on the

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[4](...continued)
not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional." Trial 844.

data and information available to me, the plea of not guilty by reason of insanity was a viable one to present to the jury." RT 589.[5]

Dr. Kaushal Sharma testified that he too was: "very surprised to learn that the defense withdrew the insanity phase of the trial. I was not consulted about the wisdom of this course ahead of time and I would have questioned it. I would have asked why this was being done and what benefit there was in this course of action after a finding of first-degree murder. In my judgment, if presented to the jury, Alexandre [Mirzayance] had documentary evidence, lay witnesses, and qualified, experienced expert witnesses to support defenses to both premeditated murder and to show insanity at the time of the killing. I have seen mental state defenses put on with far less compelling supportive evidence." MER 610 . The parents' input to him about their son's "mental state and history could have come into evidence through my testimony." Id. at 610-611. (In fact, most of the parents' knowledge about petitioner's childhood had already been presented to the jury during guilt phase through Dr. Satz's testimony, *e.g.*, Trial RT 474, 479; 481.)

Dr. Richard Romanoff testified he found in

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[5] Dr. Markman arrived at the courthouse the morning the NGI trial was to begin. When Wager told Dr. Markman he had just waived the NGI trial, Markman immediately responded, "Now, that was a mistake." RT 123. Dr. Markman was highly regarded by Wager as a middle of the road doctor with a good reputation. RT 34.

respondent "substantial evidence of cognitive disorganization and an active thought disorder. In talking to him, I found a lot of his conversation wandered from one topic to another. At times, it was difficult to follow this conversation due to the absence of any logical connection between the thoughts expressed by Mr. Mirzayance. Mr. Mirzayance reported on-going auditory and visual hallucinations and intense fearfulness and paranoia. He mostly exhibited a blank and affectless expression. Testing provided substantial information about the nature and severity of his psychotic thought process. I concluded that it was ... most likely that this disorganization, confusion, and psychotic process is more pervasive and long standing in nature and not simply a reaction to the recent tragic events that had unfolded. I found that he suffered from a severe and debilitating mental illness." MER 632.

Dr. Sandhu, a prosecution expert, opined respondent was not insane, but also that he did not premeditate or deliberate the killing. RT 437. According to his resume, Dr. Sandhu has focused his career on geriatric psychiatry. RT 424. He agreed respondent's bizarre behavior at the Ookhten home the afternoon of the homicide "could be somebody who has some paranoia, yes." RT 454. He found "no motive or rationale for the crime," and knew the relationship between Mirzayance and his cousin had been fairly close. RT 450. He agreed that while in jail following his self-surrender, that doctors at the jail "had to determine

that he was psychotic in order to get an antipsychotic drug," as respondent was prescribed. RT 446-447.

Dr. Seawright Anderson was the other prosecution psychiatrist. He turned out to be supportive of the insanity defense when questioned at the federal hearing. Dr. Anderson agreed with virtually all the observations and analysis of the defense experts noted above. RT 412-413. His diagnosis of respondent was schizoaffective bipolar disorder with a history of marijuana and hashish abuse, accompanied by "psychotic episodes most of his life." RT 412. When asked if respondent "at the time he was harming the victim he knew that harming her was wrong," Dr. Anderson testified: "I felt that he felt that he was justified in doing what he was doing because of the psychotic condition he was under. In breaking it down that way, we would say he felt that he was justified in not doing anything wrong from his interpretation, not from the legal interpretation." RT 418-419. Not understanding wrongfulness at the time of the homicide due to psychosis is legal insanity under the California right/wrong test.

SUMMARY OF ARGUMENT

The Ninth Circuit panel correctly applied the 28 U.S.C. § 2254(d) standard to the facts established at the evidentiary hearing to properly conclude that the state court denial of relief was an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), and its progeny. The Ninth Circuit panel correctly found that no

valid tactical reason existed for withdrawing the likely meritorious insanity defense.

ARGUMENT

I. The Panel's Unpublished Opinion Was a Straight Forward Application of 28 U.S.C. § 2254 to an Ineffective Assistance of Counsel Claim for Which Respondent Established Both Deficient Performance and Actual Prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

A. Petitioner's Claim that the Panel Relied on a New Rule is Rebutted by the Record. No New Rule Was Announced.

Attempting to create a *certiorari* worthy issue, petitioner asserts the panel found that any time there is "nothing to lose" in advancing a potentially arguable defense, it is ineffective assistance of counsel not to litigate it regardless of the merits or strength of the defense. Petition, p. 11. Not so. The panel held that in the detailed factual context of this case as established at the federal evidentiary hearing:

> Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. *Strickland,* 466 U.S. at 688. Counsel testified at the evidentiary hearing that he recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found

> premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of Mirzayance's parents to testify in the insanity phase. PA B-4.

The panel found that trial counsel's emotional decision made on the drive to the courthouse the morning of trial was based on speculation. The panel decision did not apply a "nothing to lose" rule, nor did the panel even use such language. It noted that its citation to Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987) in the first panel decision remanding for a hearing was to emphasize that trial counsel's self-labeling a decision as "tactical" does not necessarily mean the decision was truly tactical, that is, a choice between "alternatives that each have the potential for both benefit and loss." PA B-4.

The panel correctly found the decision made by counsel was unreasonable because on the facts of this case there was no tactical advantage in the decision to give up the only defense available (PA B-6), and that the decision was based on Wager's misguided speculation that the jury's guilt decision on first degree murder doomed the chance for an insanity verdict. Ibid.[6] Further, the decision to withdraw

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[6] Wager testified the jury "whether they knew it or not, under the (continued...)

first developed on a drive to the courthouse the morning of the NGI trial when the respondent's parents expressed reluctance to testify, and that this angered counsel such that he lost his sense of advocacy. Id. at 5. The panel correctly found that the reluctance was hardly cast in stone given that respondent's father, according to trial counsel, thereafter changed his mind and said he would testify and then said that he wouldn't. RT 106. Based on the record of the strength of the defense evidence, the panel further found prejudice in that there was a reasonable probability sufficient to undermine the confidence in the outcome of the case. Id. at 6.

B. Strickland's Two Prong Test Applied.

This decision hardly stands for the "nothing to lose" standard put forth by petitioner. Rather, it is a classic application of this Court's Strickland two prong test: was counsel's performance deficient, and was there prejudice? Wiggins v. Smith, 539 U.S. 510, 521 (2003).

1. Counsel's Deficient Performance. Petitioner can point to no case that finds adequate performance where trial counsel surrenders his client's only and entirely credible defense for no benefit whatsoever. Such a case could not withstand scrutiny under this Court's teaching in Wiggins. In assessing counsel's tactical choice, Wiggins noted that counsel elected there not to present mitigation evidence at

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[6](...continued)
facts of this case, [found respondent] legally sane. RT 65, 125, 145.

sentencing and elected "to pursue an alternate strategy instead." Ibid. That tactical choice was found unreasonable even though there was an alternative that counsel was pursuing. Here, there was no alternative strategy whatsoever. Counsel just gave up the one and only perfectly good defense for no countervailing benefit as opposed to "making an informed choice among possible defenses." Id. at 525.

Indeed, none of the three cases cited at Pet. 12, support petitioner. In Jones v. Barnes, 463 U.S. 745 (1983) the defendant requested several issues be argued by his appellate counsel. Counsel used his own discretion and argued three of the seven issues as the strongest arguments for relief. All of the issues were before the appeal court. This Court upheld that strategic choice where counsel argued the strongest issues. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752.

Arguing all the claims was not required. Jones stands for the non-controversial proposition that counsel's reasoned choice to argue stronger defenses as opposed to marginal ones is effective assistance of counsel. (U.S. v. Cronic, 466 U.S. 648 (1984), cited by petitioner at Pet. 12, is not relevant to these issues.)

Evitts v. Lucey, 469 U.S. 387, 394 (1985), cited Jones v. Barnes, *supra,* and upheld a grant of habeas relief

based on trial counsel's failure to perfect the initiation of defendant's appeal, stating counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."

In Evans v. Meyer, 742 F.2d 371, 373-374 (7th Cir. 1984), the court held that the defendant had a theoretical defense of intoxication, but faced 120 years if convicted by trial. Counsel's advice to plead guilty and receive a 9 and 1/2 year sentence was reasonable because "no competent counsel would have advised Evans to risk a trial in which his defense would have been intoxication." Id. at 373. Of course, an attorney may advise a client to plead guilty, even when there is a *bona fide* potential defense, so long as the advice falls in the range of competence. In Evans v. Myer, where there was a theoretical defense, counsel was competent in advising a guilty plea and saving the client a potential century of prison time if convicted after trial.

But giving up the *only* defense a defendant has is not reasonable conduct under the Sixth Amendment when there is no risk in advancing it and the defense is viable.

As to prong one of Strickland, the unreasonableness of the decision was clear given the hasty decision made in anger and a sense of "hopelessness." Wager could not assure the federal court that he was functioning as an advocate[7] for respondent when he advised his client to waive

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[7] "Q. Do you think that morning, given your anger at the parents, (continued...)

his only defense (based in part upon his erroneous understanding of the law). Yet, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975), quoted in U.S. v. Cronic, *supra* at 655.

As noted, Wager's hopelessness was in part prompted by his fundamental error in his understanding of the law, an error petitioner evidently adopts. *See* Pet. 13. But as the panel opinion states, defense counsel was wrong. B-5 n.1. The legal issues between murder elements and NGI are different, and it is entirely possible in California to have a first degree conviction *and* an NGI finding. *See* People v. Villarreal, 167 Cal. App. 3d 450, 455, 213 Cal. Rptr. 179 (1985) ("appellant asks us to hold that an insane person, as a matter of law, cannot commit first-degree murder," but "[w]e decline to do so"); People v. Corona, 80 Cal. App. 3d 684, 713, 145 Cal. Rptr. 894 (1978) ("[i]t is, of course, elementary that the legal defense based on insanity embraces a question different from diminished capacity [a guilt phase defense to the element of murder]." Wager's fundamental legal error tainted his unreasonable decision to abandon the NGI defense. The panel was correct to so find.

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[7](...continued)
you became so emotional that you lost your sense of advocacy? ¶ A. I'm not sure. I'm not sure." RT 124.

Also, by giving up the trial, Wager did not know that if he had cross-examined Dr. Anderson at the NGI phase, he could have obtained a highly favorable expert opinion from the State's own expert supporting the "wrongfulness" prong of the California insanity test.

Petitioner urges that the panel created a new "nothing to lose" rule because it relied on the fact that respondent gained nothing from Wager's decision to forfeit his only defense. Pet. 11. Not so. As a matter of common sense in considering prong one reasonableness, a court must consider the basis of counsel's decision and the choices available to him. Here, counsel admitted he chose to surrender the only defense available and that there was no possible upside for respondent. That is not Sixth Amendment advocacy. Consideration of the choices available to counsel is an entirely legitimate and necessary factor in considering reasonableness of counsel's conduct. *See* Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001) ("strategic" decision not to investigate held ineffectiveness); Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999) (a strategic decision is one made "on the basis of sound legal reasoning, to yield some benefit or avoid some harm to the defense"); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (ineffectiveness found where counsel "did not choose, strategically or otherwise, to pursue one line of defense over another," but instead, "simply abdicated his responsibility to advocate his client's cause.")

Abandoning advocacy and surrendering respondent's credible defense was the hallmark of ineffective counsel. As stated long ago in American Bar Association Ethics Opinion 280 (1949), counsel is to proceed with objectively viable claims even if counsel has subjective doubts whether the claim will prevail:

> [T]he lawyer...is not an umpire, but an advocate. He is under no duty to refrain from making any proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or the authorities supporting it is irrelevant.[8]

2. Resulting Prejudice. As to prong two of Strickland, the panel was correct in finding that the failure to go forward with the NGI trial undermined the court's confidence in the outcome. Respondent's strong showing caused the first panel to reverse the district court and to remand the case to determine why counsel waived such a "viable and strong" defense. PA D-75. On remand, the

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[8] *See* Commentary to §1.2, ABA Standards, The Defense Function, 122-123 (3rd Ed.1993), on counsel's duty to present the client's case: "Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment."

district court found, "witnesses could have testified credibly and therefore perhaps successfully--even though subject to potential strong cross-examination -- such that prejudice is established, as the Court's confidence in the verdict therefore is undermined." PA C-68. The second panel affirmed based on respondent's showing of a reasonable probability that but for counsel's error the outcome would have been different. PA B-6. That is a virtual textbook application of the second Strickland prong.

The record amply supports these findings. There was an unusual and strong consensus among the various mental state experts supporting an NGI finding. Indeed, one of the prosecution's experts, Dr. Anderson, endorsed the key opinion that respondent did not know the wrongfulness of his acts at the time of the homicide. That left one prosecution witness, Dr. Sandhu, a specialist in geriatric medicine, with a lone dissenting opinion.[9] Moreover, the consensus of the several experts was supported by the corroborating evidence of respondent's childhood psychological problems, treatment by child psychologists, the parents' history concerning respondent's childhood psychological problems as presented during the guilt phase

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[9] Dr. Anderson endorsed the defense experts opinions on respondent's paranoid schizophrenia at the time of the homicide. He also testified that because of respondent's psychosis at the time of the homicide, he believed himself justified in his conduct, an expert opinion supporting respondent's legal insanity, that is, a lack of understanding wrongfulness due to a mental disease.

through Dr. Satz, the lay witness testimony of Laurent Meira and the Ookhtens relatives about respondent's paranoid behavior the week of the homicide. All this expert and lay witness evidence before the jury presented the likelihood of a different result sufficient to undermine confidence in the outcome actually reached. Rompilla v. Beard, 545 U.S. 375, 379 (2005).

Petitioner argues that Wager recognized his experts had "significant weaknesses." Pet. 15. But Wager knew of these purported weaknesses well before the NGI trial, a trial that he was prepared to go forward with on the day he abandoned it. Given this, Wager's "weakness" rationale is a comment that "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description" of his thinking (Wiggins, *supra* at 526-527), and "a mistaken memory shaped by the passage of time." Id. at 533.[10]

The mere fact that there was conflicting testimony does not in any way negate the panel's finding of prejudice. Here, the overall weight of the testimony clearly supported an NGI finding, and was at least sufficiently strong to undermine judicial confidence in the outcome.

Wager's concern that the defense needed the parent's contribution about respondent's childhood was met in part by Dr. Satz's testimony at the guilt phase. As given the

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[10] There was no expert who would have been called to be impeached with a note alteration in another case, as petitioner states at Pet. 15, because Wager said he wouldn't have called him. RT 56.

jury, Dr. Satz recounted the parents' history of respondent including that he had subnormal intelligence, an extremely low self concept, and early experiences with auditory hallucinations. At age 5 or 6, they sought professional help for him. His condition became more florid so that by age 14 he was taken to see two psychiatrists. Trial RT 475-476.

As the experienced forensic psychiatrists testified (Dr. Markman, Dr. Blum, Dr. Sharma, and Dr. Romanoff), and as supported by the State's Dr. Anderson, the insanity defense was quite viable, supported by respondent's childhood history of mental problems, his paranoid conduct the week of the homicide, and psychotic break from reality at the time of the homicide. Prejudice was established.

C. The Panel Correctly Applied AEDPA's Standard of Review.

Despite the petitioner's protests to the contrary,[11] the panel recognized and applied the habeas review standard under AEDPA, 28 U.S.C. 2254(d)(1). As the panel opinion stated:

> We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996)("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its

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[11] As this case is to be assessed on its own merits, respondent will not reply to the pejorative references to the Ninth Circuit. Pet. 7-8.

> underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003)("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."); Greene v. Lambert, 288 F.3d 1081, 1088-89 (9th Cir. 2002) (explaining AEDPA standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). PA B-3.

Again, this is a textbook summary of the 2254 standard.

Next, petitioner incorrectly asserts that factual findings made by the district court were not given due deference on appeal. Pet. 8-9, 14-16. For example, petitioner states the panel incorrectly rejected the district court's finding that the parents *refused* to testify, and recharacterized their conduct as mere "reluctance" to testify.

Pet. 14. However, the R&R itself states that the "parents may not have expressly refused to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." PA C-43. The panel decision faithfully follows the lower court's factual finding that the parents' expressed reluctance to testify. But the R&R's *conclusion* that reluctance meant refusal is not a factual finding. It does not merit deference.

The panel did disagree with the R&R that Wager's decision to withdraw the defense was "rational, carefully considered, and informed." Pet. 14. That is not fact finding. That was a conclusion based on the fact that Wager made his decision, as he admitted on the stand, in anger, with a loss of advocacy for his client, on the very morning he was to commence the NGI trial and with Dr. Markman subpoenaed and waiting to testify that morning. The parent's testimony was hardly a "key" to the NGI defense given that the substance of their contribution had already come into evidence from Dr. Satz during the guilt phase, and anything additional from the parents could have come in via the NGI doctors' testimony (all of whom interviewed the parents).

Wager made a grossly unreasonable decision the morning of the trial to abandon his client's only defense. He had prepared the NGI defense, told the jury they would get the NGI trial after the guilt phase (Trial RT 117, 220, 229, 244, 258, 361, 388, 441, 487, 493-496, 553, 589, 591, 620, 688, 689-691), and had expert witnesses ready to testify the

morning he had his client waive the defense.

The key factual point on which there is no dispute is that Wager's surrender of the NGI defense had no actual or potential benefit for respondent. The legal question decided by the panel based on these undisputed facts was that Wager abandoned his client's viable defense for no rational or strategic reason, but instead for reasons of his own subjective hopelessness, anger, speculation, erroneous understanding of the law, and an abandonment of his role as an advocate. The conclusion that he acted unreasonably under the Sixth Amendment (and that the State court's unwritten "decision" was contrary to, or an unreasonable interpretation, of Strickland) is entirely correct.

CONCLUSION

It is respectfully requested that the petitioner's petition for certiorari be denied.

October 16 , 2006 Respectfully submitted,

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